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In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MARK JAMES KNIGHTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. The petition for certiorari explains that, under the well-established rule permitting searches based on consent, petitioner executed a valid and enforceable consent to future searches when he agreed as a condition of probation to "[s]ubmit his * * * person, property, place of residence, vehicle, [and] personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer." C.A. E.R. 73; Pet. App. 4a. We further explain that just as a criminal defendant may voluntarily plead guilty, thereby relinquishing the right to trial by jury and the various procedural rights that would be afforded him at that trial, nothing in the Constitution precludes a defendant from accepting probation subject to a condition per-

mitting warrantless searches by law enforcement officers.

Respondent contends (Br. in Opp. 5-6) that the government "failed to present any of these arguments to the court of appeals." That assertion is without basis. The government's brief in the court of appeals distinguished prior Ninth Circuit precedents on the ground that the court of appeals "ha[d] never squarely considered whether a probationer's consent to a search as a condition of probation is sufficient to authorize any probation search, even one that is undertaken for an investigative purpose." Gov't C.A. Br. 13. We explained that under this Court's precedents, "such a consent may constitute a valid waiver of a probationer's Fourth Amendment rights." *Ibid.* We observed that respondent "agreed to the warrantless search condition in return for obtaining the benefit of avoiding a longer custodial sentence," and that "as with waivers of other constitutional rights, [respondent's] consent is not rendered involuntary simply because he agreed to the search condition when the alternative was to refuse to accept the condition and face incarceration." *Id.* at 15-16. The government's court of appeals brief also drew on prior decisions of this Court and the California Supreme Court upholding guilty pleas entered pursuant to plea bargains. *Id.* at 16. The arguments set forth in the petition for certiorari were therefore fully aired in the court of appeals.[1]

2. Respondent contends (Br. in Opp. 6) that "the record is devoid of any factual basis to support" our position because the government did not present evidence that respondent's agreement to the search

[1] We have lodged a copy of our court of appeals brief with the Clerk of this Court.

condition was the result of a bargained-for exchange. But the validity of a property owner's consent to search does not depend on proof of a process of negotiation and exchange. It is sufficient that consent was given voluntarily, without government coercion. *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 229 (1973). By the same token, a voluntary plea of guilty entered by a properly advised defendant is valid and enforceable even if the defendant has not negotiated with the government regarding the ensuing disposition of the criminal charge. Indeed, "[o]nly recently has plea bargaining become a visible practice accepted as a legitimate component in the administration of criminal justice. For decades it was a *sub rosa* process shrouded in secrecy and deliberately concealed by participating defendants, defense lawyers, prosecutors, and even judges." *Blackledge* v. *Allison*, 431 U.S. 63, 76 (1977). Thus, until this Court's decision in *Santobello* v. *New York*, 404 U.S. 257 (1971), when "lingering doubts about the legitimacy of the practice were finally dispelled," *Blackledge*, 431 U.S. at 76, it was an open question whether evidence of negotiation between the parties could *impugn* an otherwise valid guilty plea. That history is inconsistent with any suggestion that a process of bargaining between an individual and the government is an essential predicate for a waiver of constitutional rights.

3. Respondent contends (Br. in Opp. 6, 8-9) that the Ninth Circuit's decision is consistent with the weight of authority in other courts of appeals. Respondent cites no case, however, in which a court of appeals has addressed the question whether a criminal defendant can execute an enforceable consent to future searches

as a condition of release on probation.[2] Moreover, in every one of the court of appeals cases cited at pages 8-9 of the brief in opposition, the court *sustained* the validity of the challenged probation or parole search.

In any event, as the petition for certiorari explains (at 20-21), the conflict between the Ninth Circuit and the California Supreme Court on the legality of "Fourth Waiver" searches of state probationers creates substantial impediments to effective law enforcement in the Nation's most populous State. That conflict by

[2] Respondent's reliance (Br. in Opp. 6-7) on *Morrissey* v. *Brewer*, 408 U.S. 471 (1972), and *Griffin* v. *Wisconsin*, 483 U.S. 868 (1987), is misplaced for essentially the same reasons. *Morrissey* holds that the Due Process Clause imposes some constraints on the procedures that may be employed in the parole revocation context, notwithstanding the fact that the State is under no constitutional obligation to permit release on parole in the first instance. 408 U.S. at 480-484. *Griffin* upheld a Wisconsin regulatory scheme that authorized warrantless searches of a probationer's home by a probation officer based on "reasonable grounds" to believe that a violation of the terms of release had occurred. 483 U.S. at 872-880. Neither decision addresses the question whether a probationer (or parolee) may execute a valid and enforceable consent to future searches as a condition of release into the community. Contrary to the suggestion of amicus Rutherford Institute (see, *e.g.*, Br. 2), the absence of express statutory authorization for warrantless searches of California probationers does not invalidate the search in this case. Requests for consent to search are routinely made on an ad hoc basis, and amicus identifies no case suggesting that the validity of a consent search depends on express statutory authorization to request the property owner's consent. *Griffin* is of no help to amicus; there, the Court sustained a warrantless search under *administrative* regulations promulgated pursuant to a statutory grant of authority. 483 U.S. at 870-871. The Court did not speak to the issue of consent.

itself warrants resolution by this Court.[3] See Br. of Amicus Curiae State of California 3-6.

4. Respondent contends that the present conflict between the Ninth Circuit and the California Supreme Court does not warrant this Court's resolution because the California Supreme Court may be in the process of revising its probation search jurisprudence. Respondent relies for that proposition on Justice Brown's dissenting opinion in *People* v. *Woods*, 21 Cal. 4th 668, 683 (1999), cert. denied, 529 U.S. 1023 (2000), and on Justice Kennard's concurring and dissenting opinion in *People* v. *Reyes*, 19 Cal. 4th 743, 756 (1998), cert. denied, 526 U.S. 1092 (1999). That contention lacks merit for at least three reasons.

a. The court in *Woods* observed that

> [i]n California, probationers may validly consent in advance to warrantless searches in exchange for the opportunity to avoid service of a state prison term. For nearly three decades, [the Supreme Court of California] has upheld the legality of searches

[3] Respondent suggests that the conflict in authority is of little moment because "California law enforcement officials who choose not to comply with federal law in this area retain the option of pursuing prosecution in state court." Br. in Opp. 15. But the Fourth Amendment to the United States Constitution applies equally to state and federal prosecutions; the fact that the state and federal courts in California would resolve the Fourth Amendment question presented here differently is a reason for this Court to grant review, not deny it. Respondent essentially ignores our observations that the Ninth Circuit's decisions in this and predecessor cases (1) impair the efforts of federal and state authorities to engage in cooperative law enforcement (Pet. 20), and (2) create a potential risk of civil damages liability in federal court for state officials who carry out searches that have long been upheld by the California Supreme Court (Pet. 20-21).

> authorized by probation terms that require probationers to submit to searches of their residences at any time of the day or night by any law enforcement officer with or without a warrant.

21 Cal. 4th at 674-675 (citations and footnote omitted). Respondent does not contend that a majority of the Supreme Court of California has ever disavowed either the ultimate conclusion that such warrantless searches are permissible, or the consent rationale on which that conclusion has been based. That individual members of that court have disagreed with some aspects of the majority's analysis does not lessen the practical significance of the current conflict between the Supreme Court of California and the Ninth Circuit.

b. As the petition for certiorari explains, the court of appeals' analysis in this case rests on a purported distinction between "probation" and "investigation" searches. The court held that where the purpose of a search is to confirm or dispel suspicion that a probationer is engaged in criminal activity, the search must be authorized by a judicial warrant, even if the probationer has previously consented to searches as a condition of probation. See Pet. App. 10a, 14a. Respondent identifies no opinion, however, in which *any* member of the California Supreme Court has endorsed that proposition.

In *Woods*, Justice Brown's dissenting opinion argued that officers could not rely on the Fourth Waiver to justify a warrantless search whose purpose was to investigate allegations of wrongdoing against the probationer's co-resident. Justice Brown would have held that the investigation of the co-resident was unconnected "to the reasons for imposing [a search] condition in the first place, i.e., to monitor the probationer's progress and compliance with the terms of probation." 21 Cal. 4th at 691 (citation omitted). Justice Kennard's concurring and dissenting opinion in *Reyes* took the view "that a warrantless search of a parolee is permissible only if there is a 'reasonable suspicion' that the parolee has committed a crime or has violated the terms of parole." 19 Cal. 4th at 756-757 (citation omitted). The search in this case appears valid under either of those approaches.[4] Neither of those opinions suggests that the applicability of a warrant requirement turns on whether a search aimed at the probationer is conducted for a "probation" or "investigation" purpose.

c. In *Reyes*, the California Supreme Court held that a state parolee may be subjected to warrantless searches without any showing of individualized suspicion, even though a California prisoner is not entitled to refuse parole and therefore cannot be said to have consented to the search condition. The court sustained the search on the theory that parolees have a reduced expectation of privacy in light of the conditional nature of their release, and that the interest in maintaining close supervision of parolees justifies the intrusions in

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[4] Because respondent consented to searches "with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer," C.A. E.R. 73; Pet. App. 4a, the validity of the search in this case does not depend on whether the searching officers had individualized suspicion of wrongdoing. The district court found, however, that "reasonable suspicion" existed, see Pet. App. 30a-31a, and the court of appeals did not question that holding. Rather, the court found that the search was invalid because the officers who conducted it were "using the probation term as a subterfuge to enable [them] to search [respondent's] home *without a warrant*." *Id.* at 10a (emphasis added).

question. 19 Cal. 4th at 747-754; see Pet. 10-11 n.8. In *Woods*, Justice Brown's dissenting opinion stated that "the consent theory articulated in *People* v. *Bravo* * * * may be largely moot in light of [*Reyes*]. * * * Th[e] administrative necessity rationale of *Reyes* applies equally to probationers and should effectively supersede the fictive consent justification of *Bravo*." 21 Cal. 4th at 686; see Br. in Opp. 12.

Justice Brown's statement provides no support for respondent's suggestion (Br. in Opp. 12-13) that the present conflict between the Ninth Circuit and the Supreme Court of California may resolve itself without this Court's intervention. To the contrary, Justice Brown simply recognized that under *Reyes*, warrantless searches of adult probationers may be permissible without regard to the validity of the probationer's consent. That such searches are now potentially sustainable under California Supreme Court precedent on two bases rather than one scarcely diminishes the conflict between that court's decisions and those of the Ninth Circuit.

5. The petition for certiorari explains (at 8 & n.5, 20) that the Ninth Circuit's probation search cases, taken together, have failed to articulate coherent and administrable standards for distinguishing valid from invalid searches. See *United States* v. *Conway*, 122 F.3d 841, 843 (9th Cir. 1997) (Wallace, J., concurring in the result) ("Our precedent on the Fourth Amendment standards governing state probation searches is in considerable disarray."), cert. denied, 522 U.S. 1065 (1998). The need for such standards is of critical importance to administration of the Fourth Amendment, "lest every discretionary judgment in the field be converted into an occasion for constitutional review." *Atwater* v. *City of Lago Vista*, No. 99-1408 (Apr. 24, 2001), slip op. 26; see

ibid. ("Often enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made.").

Respondent contends (Br. in Opp. 13) that "[t]he rule is simple: the consent-to-search term of a probation agreement is limited to probationary searches, and not investigatory searches." But because the most fundamental term of probation is that an individual must refrain from committing further crimes, any meaningful effort to monitor and supervise a probationer will necessarily involve efforts to determine whether the subject is involved in criminal activity. The purported distinction between probation and investigation searches is especially elusive as applied to persons on summary probation in California, who are not directly supervised by a probation officer. See Pet. App. 4a.

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For the reasons stated above, and for those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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